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SUPREME COURT OF THE UNITED STATES

DANFORTH GEER, WILLARD E. GAY, ARTHUR W. SMITH ET AL., APPELLANTS,

against

THE MATHIESON ALKALI WORKS, THE CASTNER ELECTROLYTIC ALKALI COMPANY, EDWARD R. ARNOLD ET AL.

BRIEF ON BEHALF OF THE APPELLANTS.

W. W. MACFARLAND,
Of Counsel.

MACFARLAND, TAYLOR & COSTELLO,
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Nos. 68-65 Wall Street,
Borough of Manhattan,
New York City.

Supreme Court of the United States.

DANFORTH GEER, WILLARD F. GAY, ARTHUR W. SMITH *et al.*,
Appellants,

AGAINST

THE MATHIESON ALKALI WORKS, THE CASTNER ELECTROLYTIC ALKALI COMPANY, EDWARD E. ARNOLD *et al.*

BRIEF ON BEHALF OF THE APPELLANTS.

Statement of the Case.

This is an appeal from a decree of the Circuit Court for the Southern District of New York in effect, dismissing the complainants' bill for want of due service of process.

The suit was commenced in the Supreme Court of the State of New York. It is a bill in equity, brought by stockholders of the defendant corporation against the company and its directors to set aside a conveyance of property of the corporation, on the ground that such conveyance was fraudulent and void or voidable as against its stockholders (pp. 3–15).

The Mathieson Alkali Works and the Castner Electrolytic Alkali Company joined in a petition to the State Court for a removal of the cause to the Circuit Court of the United States (pp. 18–20).

They say in their petition, that so far as they are concerned, the controversy is wholly between citizens of different States, *and that the controversy is a separable one*, and removable on that ground. The case could not have been removed on any other ground, because Geer and Gay, plaintiffs, and the defendants, Wilson, Agar and Ely, are citizens of the same State, and other complainants are aliens (pp. 2, 8).

The underlying proposition of the petition is, that in such a case the directors of the granting corporation, who, as agents of the stockholders, made the fraudulent conveyance in the name of the corporation, are neither necessary nor proper parties. Unless that proposition can be sustained, of course, the decree, which denied the motion to remand, must be reversed (Motion, p. 1; Order, p. 21).

The motion to remand having been denied and jurisdiction retained, the Mathieson Company thereupon moved to dismiss the suit for want of due service of the summons (p. 22). The Castner Company was not a party to this motion.

The motion was granted (p. 44), and the service of the summons was set aside. The effect of granting the motion was to dismiss the bill, as by a final decree. The material facts are undisputed, and they will be found set forth in two affidavits of Mr. Taylor (pp. 26, 40).

It appears that the suit was commenced in the Supreme Court of the State, August 1, 1901, by the sevice of the summons in accordance with Section 432 of the Code of Civil Procedure of the State (fols. 60, 61, 62).

About six days before the expiration of the time to answer, the defendant corporations filed a petition for removal (fol. 52).

There was an order of removal August 14, 1901, but the record was not filed in the Circuit by the defendants until more than two months later, when they were compelled to do so by a motion to remand (fol. 52).

That motion having been denied, then, on the eve of default for want of an answer, the Mathieson Company, as before stated, moved to dismiss the service of the summons, and the motion was granted. The cause of action was the fraudulent disposition of real property, situate within the State, and, therefore, it was a ground of action arising within the State, and of such a nature that it could be enforced nowhere else, except in the courts of the State, or a Federal Court sitting there (fols. 53, 54).

The statutes of the State expressly confer jurisdiction in such cases as explained in People *v.* Ballard, 134 N. Y., 269.

This fact alone is decisive in favor of the jurisdiction in connection with the fact, that service of process was made as required by the Code upon a resident director. But in addition, there is present every other possible element of jurisdiction. The City of New York is, by by-laws made, the elected home and seat of government of these corporations, who are separate only in name, their interests being identical, and the government of each the same (fols. 14–16, 54, 55).

The whole capital stock of the Castner Company, the nominal grantee of the Niagara plant, is owned by the Mathieson Company (fol. 85).

The product of the defendants' factories is all sold through a New York City agency, controlled by the defendant Arnold (fols. 80, 81).

There the defendants' accountant resides and performs his functions (fols. 82, 84, 86).

The very last meeting of the board of the Mathieson Company for the election of directors and appointment of executive officers was held in the City of New York, in accordance with the by-laws of the company (fols. 81, 82).

At that meeting James M. Edwards, a resident of New York City, was elected president of the company. He swears in an affidavit (fol. 73) that he is a resident of Tennessee, but it appears under his

own hand that this is untrue (see foot of p. 7 and top of p. 8). Besides, the New York City Directory has located him at No. 144 West Fifty-eighth street for years (fols. 79, 80).

At the same time, it is not of the slightest moment where Edwards lives.

It is to be regretted that the absence of any opinion prevents us from knowing, or even making an intelligent guess, as to the grounds on which the service of the summons in this case was set aside.

The affidavits for the Mathieson Company, say that it has no property in the State of New York, but it is inconceivable that decision should have been placed on that ground. It would be begging the very question to be decided on the merits. Confessedly, the company yesterday owned the Niagara plant. It owns it to-day, unless there has been a valid conveyance as against stockholders. Therefore, to assume that it had no property in the State would be to decide that the conveyance was valid without hearing the cause! The Court, certainly, could not have proceeded on that absurd notion.

Assignment of Errors.

"I.—The Court erred in holding that a "separable controversy existed between the "complainants on the one side and the de-"fendants, The Mathieson Alkali Works, and "The Castner Electrolytic Alkali Company, "on the other."

"II.—The Court erred in refusing to re-"mand the cause to the Supreme Court of "the State of New York."

"III.—The Court erred in setting aside the "service of the summons."

"IV.—The Court erred in holding that the "defendant, The Mathieson Alkali Works, "being a foreign corporation and not having "an office or place of business in the State of "New York, service of the summons and "complaint upon a resident director cannot

" confer jurisdiction upon the Court over said
" defendant."

" V.—The Court erred in dismissing the
" bill of complaint against the defendant The
" Mathieson Alkali Works."

ARGUMENT.

FIRST.

There is no separable cause of action stated in the complaint, and, therefore, no right of removal on that ground.

I.—Mr. Black, in his edition of Dillon on The Removal of Causes, states the result of the decisions on this point in the following words (Sec. 77):

> " The clause in question plainly contem-
> " plates the existence in the case of two or
> " more controversies, one of which is wholly
> " between citizens of different States, and is
> " so far separable from the rest of the litiga-
> " tion, that it can be fully determined be-
> " tween them."

The rule, as thus stated, has been frequently laid down by this Court.

Hyde *v.* Rable (104 U. S., at p. 409).
Frazier *v.* Jennison (106 *Id.*, 191).
Ayres *v.* Wiswell (112 *Id.*, 187).

See also

Broadway Ins. Co. *v.* Chicago Ry. Co. (101 Fed. R., 507).
Black's Dillon, Sections 143, 144.

In the application of the rule merely nominal parties are disregarded.

II.—The directors are not nominal and unnecessary parties, when by the bill they are expressly implicated in a breach of trust, an abuse of the corporate name and seal, and a fraudulent disposition of the property intrusted to their management, as they are in this case (pp. 14, 15), and where, as in this case, the bill prays for relief against them.

Seddon *v.* Virginia, etc., Co. (36 F. R., p. 6).

In that case, it is said (and the language is plainly applicable):

> "The charges in the bill and the prayer
> "for relief make a single controversy.
> "It is not a separable controversy, so as
> "to enable some of the defendants to remove
> "the cause into this court. The plaintiffs
> "have sued the defendant jointly, as they had
> "a right to do, and they must be treated as
> "joint defendants and real parties to the con-
> "troversy "(p. 9).

Hanover *et al.*, Bank *v.* Credits Commutation Co. (118 F. R., 110), is also exactly in point.

A petition for removal on the ground of a separable controvery, necessarily assumed the existence of a right of action in the complainants against the directors.

A right of action in this case, growing out of this *single transaction*, namely, the fraudulent conveyance of the property of the Company. Now, everything relating to that transaction is interwoven and interdependent. It cannot, therefore, be carved up into separate grounds of action any more than you could carve several human beings out of one. The truth is that the directors are the real defendants, the corporations, whose names they have used and abused, are merely legal entities or niduses, whose presence is legally essential for mechanical purposes.

Black's Dillon on Removal of Causes (Section 87).

The directors of a business corporation, which is practically a copartnership (Erwin *v.* Oregon Ry. Co., 27 Fed. R., 625; Morawetz on Corporations, Sections 973, 818), are in a very strict sense accountable agents.

It is submitted, then, that the cause was not removable, because there is no separable controversy in the record, and that it should have been remanded.

We now come to the second point, which is:

SECOND.

That it was error to hold the service of the summons invalid, and to set it aside, thus, in effect, dismissing the bill.

I.—On this point the case is—except in the feature mentioned below—identical with the case of Conley against The Mathieson Alkali Company, referred to in the statement of the case, and recently submitted to the Court. It would seem to be only needful to refer to that argument, so far as it goes, without repetition here.

II.—The case is substantially a suit in *rem*. The *res* is an extensive manufacturing plant, which the owners, the stockholders of the company, are seeking to reclaim. They may not succeed, but it is plain to common sense that they have a right to try to do it, and it is equally plain that if they have any remedy, it is only to be found in the courts of the State within which the property is situate. Personal service in such cases is never necessary. The action is not transitory, but local. It is the specific thing that has to be dealt with, and all that is needful in respect to procedure is such notice, by publi-

cation or otherwise, as general principles or local practice may prescribe. In such cases there is a *jus ad rem* to be worked out only where the thing is locally situate.

Waples on Proceedings in Rem., Chapters 56 and 57.

By the hypothesis underlying the decision below, we might have this state of things—indeed, we do have it substantially.

The entire manufacturing plant of a Virginia corporation is situate in the State of New York. The directors for the time being, make a fraudulent disposition of the whole property. It is decided, that the defrauded shareholders have no remedy in the courts of New York. We are not informed by any opinion, why they have not, or where else they are to seek for one. Certainly, one could not be found in a Virginia hamlet or jungle, or at the casual home of peripatetic officials in one State or another. The very nature of the cause of action makes it local, and, therefore, the case has nothing to do with the rules applicable to transitory rights of action.

III.—But every possible ground of jurisdiction exists, for, in addition to the decisive consideration stated above, service of process was made in precise accordance with the provisions of the Code of the State that are applicable to all actions (Section 432).

It is not at all true in any practical sense, that modern business corporations "dwell in the place of their creation."

Their promoters inspect the statutes of the different States, incorporate under those they deem most favorable for their purposes, and then establish themselves in some great centre of commercial activity, where, as in the present instance, its real home is established, and from where all the business is transacted; where by by-laws its very domicil is

established, and its directors are required to meet and act (p. 28).

Certainly, the juggling with jurisdictions and courts exhibited by the practice in this case is not to be sanctioned or encouraged without the most pernicious consequences to the administration of justice.

THIRD.

It is submitted, that the order or decree vacating the service of the summons, and, in effect, dismissing the bill, is plainly erroneous, and should be reversed.

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Of Counsel.